IN THE MATTER OF THE APPEAL FROM TERMINATION OF XXXXX, Appellant, and CITY OF ZZZZZ, Respondent.	)	California State Mediation and Conciliation Service Case No. 97 3 709 ARBITRATION AWARD Ernest S. Gould, Arbitrator

INTRODUCTION

Effective May 15, 1998, Ms. XXXXX (hereinafter Athe Appellant@) was terminated from her employment as a Human Resources Analyst with the City of ZZZZZ (hereinafter Athe City@). As a result of the allegations which lead to the termination appealed from herein, separate Investigative Interviews were conducted of Appellant and a co-worker, xxxxx on April 3, 1998. Prior to her discharge, Appellant had been notified in writing by letter dated April 9, 1998, of the City=s intention to dismiss her from employment, and on April 28, 1998, a Skelly hearing regarding the charges against her was conducted.

A timely appeal was made from the decision to terminate pursuant to Rule XII, Section

6.3 of the City=s Personnel Rules and Regulations. The undersigned Arbitrator was selected by mutual agreement of the parties from a list provided by the California State Mediation and Conciliation Service.

Hearings were conducted in this matter on October 7, November 19, December 7 and December 8, 1998. The proceedings were reported and transcribed by Yates & Associates, Certified Court Reporters. All references to this record are designated herein as reporter=s transcript (AR.T.@).

Appellant was represented by xxxxx of the firm of xxxxx. The City was represented by xxxxx of xxxxx. The Appellant and the City filed written closing briefs concurrently on January 26, 1999, and the matter was submitted for binding arbitration pursuant to Rule XII, Section 6.3 of the City of ZZZZZ Personnel Rules and Regulations.

2.

BACKGROUND OF THE CASE

It was undisputed that Appellant had been employed by the City for approximately 18 2 years prior to her termination, and that she had not previously been disciplined. On or about March 6, 1998, Appellant was a Human Resources Analyst whose immediate supervisor was xxxxx, the Human Resources Division Manager. xxxxx, in turn, reported to xxxxx, the City=s Management Services Director. xxxxx reported to the City Manager, xxxxx.

On March 6, 1998, a relatively new City employee, xxxxx, commented within the hearing of her co-workers, xxxxx, xxxxx, and Appellant, that the City Manager, xxxxx, had come over to her after she started working for the City and told her about his employment history

at ZZZZZ. xxxxx commented that she thought it was very nice of him to come over and talk to her and that she thought he was quite friendly. This provoked the Appellant to make certain comments regarding Mr. xxxxx and another supervisor, Mr. xxxxx, the City=s Management Services Director. The comments alleged to have been made are set forth in more detail in ACharge 1" below.

On the same date, and within the hearing of xxxxx and the Appellant, another of Appellant=s co-workers, xxxxx, commented that several City employees had taken a longer than usual lunch the prior week. These included the City Manager, the Human Resources Manager (xxxxx), and one xxxxx, among others. When told that the lunch lasted more than an hour, Appellant and xxxxx expressed concern that xxxxx had better have reflected the extended lunch on her timesheet since, according to xxxxx, xxxxx had been suspended for two days because she did not document her hours properly on a timesheet when she had attended another employee=s funeral. There then ensued further discussion and actions as are more fully set forth in ACharge 2" below.

The Appellant was terminated based upon the following alleged incidents and conduct (which is quoted herein verbatim from the City=s Notice of Termination dated May 12, 1998, which is in evidence herein as the City=s Exhibit B.) For reference, the following are referred to as Charges 1, 2 and 3, respectively:

Charge 1: AOn about March 6, 1998, you were engaged in a conversation with co-workers. When the City Manager was mentioned in that conversation, you said words to the effect, >Yeah, he is real nice and friendly. Did he

tell you about how many women he has slept with here at the City? Be careful of him. He has had affairs with women in City Hall while he was married. I can=t stand him and neither can my husband.= You also implied that certain employees had received promotions in return for sleeping with the City Manager. You then continued to talk about other City employees who had engaged in sexual relations with co-workers. In particular, you mentioned that xxxxx and xxxxx had an affair, and added that the affair resulted in Ms. xxxxx having a tubular pregnancy, for which she had to have surgery. When a co-worker suggested that it could just be gossip, you persisted in your slanderous and discourteous conduct and stated that it was all true.@

Charge 2: AOn about March 6, 1998, you speculated that a co-worker may have taken an extended lunch without reporting it on her timesheet. Without any evidence, you stated that she should be suspended for it and added that the City Manager and the Human Resources Manager should also >get in trouble= for allegedly permitting the co-worker to >falsify= her timesheet. xxxxx then went into xxxxx=s office to look for the timesheet in question. You followed her and told her where she should look. You also went through xxxxx=s in-basket looking for the timesheet. Later that day, you asked a co-worker to look for the timesheet when she had the opportunity, stating that >it wouldn=t look good for our >new= City Manager and our >new= H.R. Manager to be going against the rules.= At

no time did you have authorization to conduct this >ad hoc= investigation, nor did you report the matter to management.@

Charge 3: On about April 3, 1998, in an investigatory interview, you were asked about the allegations set forth in Allegation Nos. 1 and 2 above. In response to each question, you either denied the allegation or stated that you did not recall the conversation or events, despite being admonished several times of your obligation to cooperate and tell the truth. In particular, you stated that you did not recall any conversation about the City Manager or about discussing the sexual affairs of other City employees on about March 6, 1998. You also stated that you could not recall any conversation on that date about a co-worker who had taken an extended lunch. Further, you denied attempting to obtain the co-worker=s timesheet and witnessing anyone else attempting to get it. You stated that you did not see xxxxx search xxxxx=s desk. Rather, you stated that you did not >know anything about it.= Finally, after being informed that your story significantly differed from the other employees= statements, you confirmed your understanding that failure to tell the truth could result in disciplinary action, up to and including termination, and persisted in affirmatively denying all of the allegations.@

Based upon the foregoing, the City terminated Appellant=s employment on the basis that she had violated the City=s Personnel Rules and Regulations as set forth in Rule XII, Section 6, which prohibits the following:

1. A. . . discourteous treatment of the public or other employees.@

2. AWillful or negligent disobedience of any law, ordinance, City rules, Department regulation or superior=s lawful order.@

3. AConduct unbecoming an officer or employee of the City.@

4. AWillful making of a false official statement.@

5. AInsubordination.@

As stated in the Notice of Dismissal (Exhibit B herein), the City=s determination to discharge Appellant was approved and issued over the signature of xxxxx, City Manager. That decision stated, in part, as follows:

> AMy decision to terminate your employment with the City was made after carefully considering your response to the Notice of Proposed Termination. In this regard, it should be noted that when we met to discuss the proposed termination on April 28, 1998, [the Skelly hearing] you continued, through your representative, to deny virtually all allegations against you despite the fact that your denials significantly differed from the other employees= statements. (One notable exception to your denials was that you now admitted to going by xxxxx=s door while xxxxx was going through her (xxxxx=s) desk, whereas when previously questioned on April 13, 1998, you stated >I don=t know anything about it.=) Given the overwhelming amount of credible evidence contradicting you, your persistent denials further show a dishonest and unremorseful attitude.
>
> Finally, I find that your misconduct exhibits an intent to discredit and undermine City management. As a confidential employee working in the City=s

Human Resources Office charged with administering and enforcing the City=s Personnel Rules and Regulations, such misconduct is all the more serious as it undermines the very nature of the job you were entrusted to perform.@

This Appeal (sometimes referred to herein as Athe Hearing@) followed.

The City=s Personnel Rules and Regulations constitute the only document governing employer-employee relations between the City of ZZZZZ and the Appellant herein. The submission to arbitration herein did not include any stipulation regarding the use or interpretation of external law in determining the issues presented herein.

3.

ISSUES

The general issues presented in this Appeal are as follows:

1. Are the allegations contained in the City=s Notice of Termination dated May 12, 1998 (Exhibit B), true?

2. If any or all are true, is termination the appropriate discipline therefore?

4.

SUMMARY OF EVIDENCE

It was undisputed that Appellant was a confidential employee prior to her termination and, as such, had access to the personnel records of all other City employees, including changes in marital status, medical claims and the like.

The charges against Appellant arose out of three incidents, identified as Charges 1, 2 and

3 herein, and set forth verbatim in the ABackground of the Case@ section above. The incidents leading to Charges 1 and 2 both occurred on March 6, 1998.

The first of these incidents involved statements alleged to have been made by the Appellant with respect to the City Manager (xxxxx) having had affairs with women in City Hall while he was married, implying that certain female City employees had received promotions in return for sleeping with the City Manager. It also involved statements regarding alleged sexual conduct of the Management Services Director (xxxxx) with another City employee.

On April 3, 1998, Appellant was called to an Investigative Interview conducted by xxxxx, attorney for the City of ZZZZZ, and xxxxx, Manager of the City=s Human Resources Division. Appellant was ordered to answer xxxxx=s questions truthfully. She was twice warned that failure to do so could result in termination.

At this Investigative Interview, Appellant had to check her calendar to determine whether or not she was at work on March 6, 1998. She determined that she was. When asked if anyone made comments about the City Manager, she responded ANo.@ After reviewing a co-worker=s written statement regarding comments allegedly made by her on March 6, 1998, Appellant responded that she Adidn=t recall@ making such statements and that it might have been something she thought of but didn=t say. Appellant similarly denied or stated she couldn=t recall any of the allegations in Charges 1 and 2.

Appellant=s responses at the time of the Investigative Interview were established by the testimony of xxxxx and xxxxx. Appellant=s responses were also confirmed by the written notes made by xxxxx and xxxxx at the time, which were introduced into evidence as the City=s Exhibits E and G, respectively (as well as a typed Ade-coded@ copy of xxxxx=s notes prepared

at the request of the Arbitrator and offered into evidence as Arbitrator=s Exhibit G-1). Appellant requested but was denied the right to have counsel present at the Investigative Interview.

At the time of her Skelly hearing on April 28, 1998, Appellant responded to all charges only through statements made by her counsel, xxxxx, and it appears that those statements continued the responses given at the time of the Investigative Interview, and consisted of either denials or statements that Appellant was Aunable to recall@ any such statements or actions.

At the time of the Hearing of this Appeal, Appellant first testified that she only referred to xxxxx sleeping with one woman employed by the City but did not mention that woman=s name. Appellant admitted saying that neither she (Appellant) nor her husband could stand the City Manager. (R.T. 490-491.)

In later testimony at the Hearing, however, Appellant changed her testimony to indicate that she had also commented that there were rumors about the City Manager sleeping around with other people (R.T. 559:1-5 and R.T. 561:19 - 562:19). Appellant conceded at this Hearing that she told her co-worker xxxxx, to Abe careful@ of the City Manager.

Appellant testified that she was trying to give a warning to her new co-worker, xxxxx, since, knowing the City Manager=s Ahistory@, Appellant was afraid of some kind of sexual harassment and claims against the City. (R.T. 485 3-19) Appellant testified that the basis of her fear of sexual harassment claims against the City was the fact that the City Manager dated one female City employee when he was separated from his wife; he had been heard to tell Asexual jokes@ in the office; and he had danced with several female City employees at the same time in a Aprovocative@ (bumping and grinding) manner during an office Christmas party.

The City Manager testified that it was well known that he had dated a female co-worker

during a separation, but that he had never had a social relationship with any other female City employee.

All of the other statements claimed to have been made by Appellant as part of Charge 1, were alleged by the City to have been made by Appellant to xxxxx, and to have been overheard by Appellant=s co-workers xxxxx and xxxxx. All three of Appellant=s co-workers prepared written statements as to the events on March 6, 1998, and those statements were offered in evidence herein as Exhibits C, D and F, respectively.

All three co-workers also testified at this Hearing and supported the City=s allegations with regard to Appellant=s utterances respecting the City Manager, and his alleged sexual activities with other women working for the City. xxxxx and xxxxx also confirmed that Appellant indicated or implied that female City employees were promoted based upon sexual contact with the City Manager.

As part of the first charge, it was also alleged that Appellant stated that another supervisor, xxxxx, had an affair with a female City employee who became pregnant and required surgery. Appellant denied or could not recall any such statement when she was questioned at her Investigative Interview. Her responses were the same at the time of her Skelly hearing (when she responded to the charges only through her counsel).

At this Hearing on her Appeal, Appellant also denied making any such statements regarding xxxxx. She was supported in this by the testimony of xxxxx, who claimed that she herself may have made such comments at some time although not necessary on March 6, 1998. It was undisputed that Appellant and xxxxx are co-workers and close personal friends of over 13

years duration.

Appellant=s alleged statements regarding xxxxx were established by the written statement of xxxxx introduced as the City=s Exhibit C, and xxxxx=s testimony at this Hearing confirming the truth of these allegations. xxxxx=s statement and testimony also supported the allegation that Appellant persisted in insisting that these statements regarding xxxxx and xxxxx were not just gossip but that they were true.

With respect to the allegations in Charge 2 regarding a Along lunch,@ Appellant consistently denied making any attempt to get a copy of the timesheet of the employee suspected of taking a long lunch, and further denied witnessing or having any knowledge that anyone else did that. Appellant maintained this position when first questioned during the Investigative Interview, later (through her counsel) at her Skelly hearing, and also at this Hearing on her Appeal (see R.T. 502:23, 504:1).

Appellant=s testimony was directly contradicted by Appellant=s own close friend, xxxxx, who admitted going into an unoccupied office that day in order to search for the timesheet of a fellow employee (xxxxx), thought to have previously taken a long lunch. xxxxx=s written statement (Exhibit F herein) noted A[XXXXX] was present during the time that I was looking for the timesheets and was aware of what I was doing.@ xxxxx=s statement also confirmed that both she and the Appellant had a conversation regarding xxxxx taking a long lunch, and that xxxxx was also privy to this conversation.

The Appellant=s knowledge of and participation in an unauthorized search for another employee=s timesheet was also confirmed by the written statement of xxxxx, to the effect that

Appellant did not go through another employee=s desk looking for the timesheet but that Appellant was telling xxxxx where to look and was fully aware of the search being done by xxxxx.

According to the notes prepared by xxxxx (Exhibit G-1, p.3), at the time of her own Investigative Interview, xxxxx stated that both she and Appellant looked at timesheets which they got from a drawer behind xxxxx=s desk, and that they should not have but they did.

All of the evidence in this matter indicated that the statements and conduct alleged in Charges 1 and 2 occurred on March 6, 1998, and on no other date.

The City=s third charge against the Appellant is based on Appellant=s responses at her Investigative Interview on April 3, 1998. This interview involved questions regarding the allegations set forth in Charges 1 and 2 above, and whether or not Appellant made the statements attributed to her in the written statement of xxxxx (Exhibit C herein), and participated or witnessed the unauthorized searching of xxxxx=s office in an attempt to locate timesheets of xxxxx.

Through the testimony of xxxxx and xxxxx, respectively, and the introduction into evidence of their notes of the Investigative Interview (Exhibits E, G and G-1), it was proven that in response to each question, Appellant either denied the statement or action or, in the alternative, stated that she did not recall the statement or action. Appellant admitted making these responses.

It was further established that Appellant was warned at least two times during the Interview that a failure to truthfully answer the questions would result in discipline, including possible termination, and that Appellant responded that she understood this.

The evidence is uncontradicted that, during the initial stage of the Investigative Interview, Appellant was asked whether or not she was at work on March 6, 1998, and that Appellant had to leave the room in order to check her own calendar. When she returned, Appellant stated it appeared that she was, in fact, at work on March 6, 1998 because she had a Aprocessing@ on that date.

Appellant, on the other hand, testified at this Hearing that she responded at the Investigative Interview the way she did because she did not even remember being at work on March 6, 1998. More specifically, she testified at this Appeal that she responded at the Investigative Interview by stating AI don=t recall@ to almost every question *because* she was not sure she was even at work on March 6, 1998. (R.T. 521:8 - 522:8; 522:26 - 523:16; 527:11 - 528:1)

The Appellant testified herein that she agreed that it was important for confidential City employees to be honest and forthright because they review very sensitive information about other employees= lives on a daily basis. (R.T. 586:25 - 587:10)

The Appellant also testified that her technique of answering questions at her Investigative Interview was based upon her review, four years previously, of her Exhibit 3 in this Hearing, which was a syllabus prepared by the City=s attorneys in conjunction with a seminar for supervisors of ZZZZZ and other municipalities. Appellant testified that she responded the way she did at the investigative interview because of suggestions in Exhibit 3 as to how a supervisor should answer questions literally when called as a witness and was testifying on the stand. As Appellant=s counsel stated: AThis document (Exhibit 3) explains why the answers were phrased the way that they were for those things which did occur but may not have occurred on that

particular date.@ (R.T. 506:4-6)

In short, Appellant contended that, since she really could not recall being at work on March 6, 1998, she could not recall any of the statements or actions she was asked about *as having occurred on March 6, 1998*. For that reason, she answered Ano@ or Acannot recall@ to each of the questions at the Investigative Interview. At this Hearing, Appellant testified that, if the questions put to her had been phrased in terms of did she recall anyone making comments about the City Manager on a day different than March 6, 1998, or Aon or about@ March 6, 1998, her answers would have been Ayes,@ not Ano@. (R.T. 520:12-21).

Appellant never made any complaint regarding sexual harassment or a hostile work environment in her City office.

Appellant testified that she was not a supervisor in March of 1998. (R.T. 511).

It was undisputed that Appellant had been employed by the City for over 18 years, and that she had never been previously disciplined. Her Exhibit 1 herein indicated overall performance ratings from 1981 through 1991 of Aexcellent,@ Asuperior,@ or Aoutstanding.@ Her Evaluation for the period from December 1992 through December 1996 was prepared by xxxxx and rated Appellant as Acompetent@ in eight areas, and Asuperior@ in five areas. Appellant objected to and submitted a written rebuttal to this Evaluation.

Appellant=s Exhibit 2 was her Performance Evaluation for the period from December 1996 to December 1997, prepared by xxxxx. Of thirteen categories rated, Appellant was rated as Acompetent@ in five categories and Asuperior@ in eight.

Both xxxxx and xxxxx testified that they could no longer trust Appellant to perform as a

confidential City employee.

5.

DISCUSSION

Appellant=s denials and Aexplanations@ for her utterances and actions herein are so utterly refuted by other credible and unbiased witnesses and evidence that Appellant=s credibility must, by necessity, greatly suffer in the comparison.[1]

Appellant chose to evade truthfully responding at her Investigative Interview. She subsequently attempted to justify this position by using the pretext of not being able to recall being at work on March 6, 1998.

This Adate game@ pretext was carried on throughout the Investigative Interview, subsequently at her Skelly hearing and, in large part, throughout the Hearing on this Appeal as well.

It is clear that the advice for supervisors in Appellant=s Exhibit 3 was never intended to guide an employee during the course of an internal investigative interview regarding alleged misconduct. It was a guide to supervisors regarding, among other things, how to approach testifying when called as a witness in suits against their municipalities.

[1] It was clear to the Arbitrator that XXXXX=S testimony at this Hearing attempted to minimize the improper conduct of her close friend, the Appellant herein. It was equally clear that neither XXXXX nor XXXXX knew Appellant well at all, and neither had any bias against Appellant or reason to misstate the facts.

It is noteworthy that, even during this Hearing, Appellant persisted in asserting that she Adid not recall@ making certain statements or performing certain acts as alleged, *because* she was still Anot sure@ that she was at work on March 6, 1998 C even after admitting that she got her calendar at the beginning of her Investigative Interview in order to confirm that she was at work on that date.

It should also be noted that, even if Appellant had been really unsure of her presence at work on March 6, 1998, the entire series of questions put to her during the Investigative Interview regarding comments about xxxxx and xxxxx, and the searching of another employee=s desk looking for a third employee=s timesheet, told Appellant very clearly what day was being referred to. Notwithstanding this, Appellant continued to play this Adate game@ throughout the Investigative Interview, subsequently at her Skelly hearing, and more recently during this Appeal Hearing as well.

Had Appellant, on the other hand, admitted the inappropriateness of her comments and actions at the Investigative Interview, at her Skelly hearing C or even during the present Hearing C she would have mitigated her misconduct and most likely avoided termination. Continuing to stonewall and game play merely reenforced the City=s position that she could not be trusted to perform as a confidential employee.

The City has the burden to show by a preponderance of the evidence that the charges alleged are true. In this case, the City has shown by an overwhelming preponderance that the statements and actions attributed to Appellant in Charges 1 and 2 are true.

Her statements might well be termed just Agossip@ of a rather gross nature. They (and the actions in assisting the searching of xxxxx=s office for timesheets) constituted poor judgment

in the extreme. This gossiping and poor judgment alone, however, would not warrant termination of a long-term employee.[2] The narrower and core issue is whether or not lying about those statements and actions later makes Appellant so untrustworthy as to justify termination. Does it destroy her value as a confidential employee?

A secondary issue is whether Appellant=s gossiping and unauthorized investigation regarding timesheets discredited and/or undermined City management. It probably did C to some extent C but again would not in itself justify termination.

Appellant=s continued evasiveness and lack of honesty, however, does justify termination.

This situation is not without sympathy. Appellant has been employed for approximately 18 2 years and could be close to retirement. She has never been disciplined before and has performed well. Still, however, it does not seem possible that she could be placed back in City employment as a confidential employee for *any* length of time. Her own conduct and lack of credibility makes this impossible.

Appellant has attempted to justify her utterances regarding the City Manager, at least, as an attempt to avoid Apotential sexual discrimination.@ Appellant and her counsel refer to Asexual harassment@ and a Asexually hostile work environment@ in an attempt to provide some legitimate basis for the gossiping. That is a stretch to put it mildly.

There is no victim of any sexual harassment in this case. There is no complaining party

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[2] Having admitted her wrongdoing in searching another employee=s office, XXXXX received a two day suspension for that misconduct and for not accurately reporting tardiness on her own timesheet.

of sexual harassment in this case. Appellant=s vague attempt to refer to sexual jokes, or to dating a City employee while separated, or supposedly suggestive dancing at an office Christmas party, fall flat. In short, no sexual harassment has been shown.

Similarly, Appellant=s argument that her statements regarding her managers are constitutionally protected free speech, also falls flat. Those comments regarding private sexual activity are not matters of public concern as to which constitutional free speech protections might pertain. They relate instead to personal animosity and/or gossip mongering which, if permitted, would adversely affect and disrupt the operation of the City and the authority of its managers. In short, Appellant has no protected right to publicly engage in gossip involving the personal lives of the City=s managers.

Appellant has further asserted that her termination constituted reprisal for her Aprotected@ conduct, under Title VII. An attempt to interpret Title VII is far beyond the scope of this Arbitration. Suffice to say that there is no protected activity in spreading gossip about the private sex lives of one=s supervisors. No unlawful employment practices have been shown to exist in this case, and there is therefore no illegal Areprisal@ involved.

Appellant also argued in closing argument that her rights were violated by the refusal to allow her counsel during her Investigative Interview. Appellant has cited the case of Sears, Roebuck & Co. v. International Union of Electrical Radio and Machine Workers, AFL-CIO-CLC, 274 NLRB No. 55, 1984-85 CCA NLRB, for the proposition that an unrepresented employee must be accorded the same right to assistance at an investigatory interview as a represented employee. In fact, that case holds exactly the opposite. In that matter, the NLRB ruled that AWeingarten rights are inapplicable where, as in the case before us, there is no

certified or recognized union. . ..@ (at P. 21,318.) Since Appellant was not represented by a union, she had no right to counsel at her Investigative Interview.

This is not a slander lawsuit. Even if Appellant=s statements (or some of them) about her supervisors had been true, they were unrelated to matters of public concern and therefore are not protected.

Appellant=s comments and participation in an unauthorized search for timesheets were likely to have a disruptive effect on the office and co-workers. (One such co-worker was upset because she felt that the Appellant and xxxxx were Aout to get her.@) The spreading of personal gossip regarding the supervisors and the promotion process could easily injure the relationship between the supervisors and other staff. The unauthorized search of a fellow employee=s office for non-business purposes was clearly wrong and was seen to be wrong by a new, temporary employee, xxxxx, who reported the same.

Still, in the final analysis, Appellant=s intemperate remarks and gossip-mongering, and her participation or acquiescence in the search for another=s timesheet, would not justify discipline as extreme as termination. That level of discipline is, however, justified herein because of Appellant=s persistent lack of candor and evasiveness. That lack of candor and evasiveness was demonstrated throughout the Investigative Interview; it continued throughout the Skelly hearing; and it continued through this Appeal Hearing as well.

It was that lack of candor and evasiveness that destroyed Appellant=s credibility and trustworthiness as a confidential City employee. Appellant=s lack of honesty justifies terminating her employment, without resorting to progressive discipline. Both of Appellant=s immediate supervisors testified that they could no longer trust Appellant to function as a

confidential employee in the Human Resources Division.

The City does not rely on the slanderous nature of Appellant=s comments in imposing discharge in this matter. For this reason, the truth of the matters asserted by Appellant is not relevant. (In addition, Appellant denied making any comments regarding xxxxx.)

The comments about xxxxx and xxxxx C outrageous and ill-advised as they may have been C and the unauthorized search of another=s office, would not warrant termination. Appellant=s lack of candor and her evasiveness does, however, warrant termination because it has destroyed her value as a confidential City employee. Appellant has only herself and her conduct to blame for this result.[3]

6.

FINDINGS OF FACT

1. The City has proven by a preponderance of the evidence that Appellant made the statements attributed to her in Charge 1 of the Notice of Termination.

2. The City has proven by a preponderance of the evidence that the Appellant either

[3] Appellant has also asserted that her responses at the Skelly hearing (through her counsel) cannot legitimately constitute an additional basis for discipline since that could require a second Skelly in order to give her an opportunity to respond to misconduct allegedly committed at the first Skelly. That is correct. XXXXX made quite clear, however, that Appellant=s conduct at the Skelly hearing was not a part of his decision-making process in confirming the discharge. While Appellant=s actions or inactions at the Skelly hearing cannot themselves be the basis for discipline, those actions can be considered in determining whether or not the level of discipline imposed was appropriate. In this instance, Appellant=s continuing refusal to acknowledge responsibility for her mistakes *can* be appropriately considered in determining whether or not termination is a proper level of discipline.

made the statements attributed to her in Charge 2, or overheard and acquiesced in such statements.

3. The City has proven by a preponderance of the evidence that Appellant assisted xxxxx in an unauthorized attempt to locate another employee=s timesheet and was fully aware of the efforts of xxxxx to locate such a timesheet by searching the office of xxxxx.

4. The City has proven by a preponderance of the evidence that, during an Investigatory Interview on April 3, 1998, Appellant was dishonest and evasive in denying knowledge of the allegations set forth in Charges 1 and 2 in this matter, and in specifically denying or claiming not to recall conversations about the City Manager or the sexual affairs of other City employees, on March 6, 1998, and in stating that she could not recall conversations on that date regarding a co-worker thought to have taken an extended lunch, and in denying an attempt to obtain that co-worker=s timesheet and/or witnessing anyone else attempting to obtain it.

7.

CONCLUSIONS OF LAW

Based upon the record herein and the findings of fact set forth above, Appellant=s statements and conduct on March 6, 1998 and April 3, 1998 constituted:

1. Discourteous treatment of other ZZZZZ City employees;

2. Willful or negligent disobedience of a superior=s lawful order to respond to questions in an honest and forthright manner;

3. Conduct unbecoming an officer or employee of the City;

4. Willful making of false official statements; and

5. Insubordination.

For the foregoing reasons, the City has proven the charges asserted herein by a preponderance of the evidence. Under these circumstances, termination of employment is an appropriate discipline and it is affirmed. The Appeal is denied.

Dated: March 9, 1999

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ERNEST S. GOULD,
Arbitrator